IN THE

Supreme Court of the United States

~~OCTOBER TERM, 1948—No. 452~~

OCTOBER TERM, 1949—No. 16

LEROY GRAHAM, *Et Al.*,

Petitioners,

vs.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN.

BRIEF OF *AMICUS CURIAE*

JAMES B. McDONOUGH, JR.,
FRANK J. WIDEMAN,
Counsel for Seaboard Air Line Railroad Company, as Amicus Curiae.

TABLE OF CONTENTS.

TABLE OF CASES.

STATUTES.

Title 28, U. S. C.:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 452

OCTOBER TERM, 1949

No. 16

LEROY GRAHAM, *Et Al.*,

Petitioners,

vs.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN.

BRIEF OF *AMICUS CURIAE*

Preliminary Statement.

The undersigned, as counsel for Seaboard Air Line Railroad Company (hereinafter called Seaboard) respectfully submit the following brief *amicus curiae*. The written consent required by paragraph 9 of Rule 27 of the rules of this Court has heretofore been filed with the Clerk.

The Seaboard is a party to the instant "case", although it was not a party to the appeal to the court below and it is not a party before this Court. Four Negro locomotive

firemen employed by it are named in the complaint as parties plaintiff (Graham (R. 9), Munlin (R. 9), Sullivan (R. 10), and Hogan (R. 11)) it is named in the complaint as a party defendant (R. 2, 73), and counsel *amicus curiae* appeared for it before the District Court for the purpose of a motion to dismiss or stay the proceedings (R. 47).

Upon that motion, by reason of the pendency of another action, the District Court in this case entered its order dated November 17, 1947, staying this action, "as against defendant, Seaboard Air Line Railroad Company and the Brotherhood of Locomotive Firemen and Enginemen as the representative under the Railway Labor Act of the craft or class of locomotive firemen employed by defendant Seaboard Air Line Railroad Company", and by the same order denied as to those same defendants the plaintiffs' motion for a preliminary injunction. That order is set out in full in the Appendix hereto.

The prior action was the case of *Hinton* v. *Seaboard Air Line Railroad Company, et al.*, No. 674, then and now, pending in the District Court of the United States for the Eastern District of Virginia. The plaintiff, Hinton, was and is a Negro locomotive fireman employed by the Seaboard, and the action was brought in his individual capacity and "as a representative of all the Negro locomotive firemen employed by the Seaboard". His complaint, a copy of which was before the District Court and is part of the proceedings in this case, attacks the same agreement of February 18, 1941, against which the instant complaint is directed (R. 6, 7, 8 and 15).

As the District Court pointed out, at the time of its stay order of November 17, 1947, all questions of service in the *Hinton* case had been passed (R. 62) although, as a matter of fact, no injunctive relief had at that time been granted.

The plaintiff in the *Hinton* case, however, promptly made a motion for a temporary injunction which was granted the following month, by order of the District Court for the Eastern District of Virginia dated December 30, 1947. It was necessary to instruct and qualify the Negro locomotive firemen in order for them to serve on Diesel locomotives, a necessity recognized by the injunction order, but qualified Negro locomotive firemen employed by the Seaboard began to serve on Diesel locomotives shortly after the temporary injunction of December 30, 1947, and they are so serving at the present time. No appeal was taken from the order granting that temporary injunction by any party to the *Hinton* case and it has remained and is in full force and effect and its provisions are being obeyed.

The *Hinton* case is mentioned in the appendix to the Memorandum for the United States as *Amicus Curiae*, filed in this Court, but even though that Memorandum is dated December, 1948, it makes no mention of the injunctive relief granted a year previously in the *Hinton* case. Counsel *amicus curiae* respectfully submit that there has been no "misuse of the processes of the law" where counsel for the plaintiffs have proceeded by an appropriate form of action in an appropriate forum. Counsel also respectfully submit that the instant proceeding is not an appropriate form of action and that it has been brought in a wrong and inappropriate forum.

Argument.

It is the position of counsel *amicus curiae* that the question of venue now before this Court cannot be properly evaluated and determined until the character of the instant proceeding is carefully considered.

The several class actions brought on behalf of Negro locomotive firemen pursuant to Rule 23 of the Federal Rules of Civil Procedure, and pending in a number of different courts, have tended to produce confusion of thought because of a failure to keep firmly in mind certain operative and essential distinctions. Those distinctions are with respect to the class on behalf of which the actions have been brought and with respect to the functioning of the Brotherhood of Locomotive Firemen and Enginemen.

All of the Negro locomotive firemen in the United States constitute a "class", simply because they are Negroes and are employed as locomotive firemen. Not all the members of that class are similarly situated, however, as a member of that class employed by a railroad that did not have a discriminatory agreement would have no cause for complaint.

There could be a class of Negro locomotive firemen employed by railroads that had discriminatory agreements. That class might, or might not, embrace only the Negro locomotive firemen employed by the twenty-one railroads listed in Exhibit A to the complaint (R. 17), as there may be other railroads that have discriminatory agreements.

There could be a class of Negro locomotive firemen employed by the twenty-one railroads listed in Exhibit A to the complaint as parties to the so-called Washington Agreement of February 18, 1941. That class, however, would be similarly situated only with respect to the matters set forth in that agreement. That agreement does not by any means constitute the entire agreement with respect to the rates of pay, rules and working conditions, of locomotive firemen. The entire agreement is in each case a separate agreement with each railroad. The Agreement of February 18, 1941, was no more than an agreement to amend

each of the separate and several agreements with the individual carriers in the respects therein set forth, and paragraph (7) should make that sufficiently clear (R. 19).

The only class of Negro locomotive firemen in which the members are similarly situated is the class employed by one railroad and subject to the agreement negotiated with that railroad. In other words, for the purposes of Rule 23(a) there are as many classes of Negro locomotive firemen as there are individual railroads having agreements negotiated under the Railway Labor Act respecting the rates of pay, rules and working conditions of locomotive firemen.

The Brotherhood of Locomotive Firemen and Enginemen functions in a dual or double capacity. The Court of Appeals for the Fourth Judicial Circuit had that fact clearly in mind in writing the opinion in the case of *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 148 F. 2d 403 (April 9, 1945). In one capacity the Brotherhood of Locomotive Firemen and Enginemen is "the unincorporated association in its common name as an entity". In its other capacity it is the representative under the Railway Labor Act of the craft or class of locomotive firemen employed by an individual railroad, in which capacity it has a multiple personality.

Counsel *amicus curiae* respectfully submit that the instant proceeding is nothing more than an attempt to join in one complaint three separate and distinct class actions which are:

> 1. The class of Negro locomotive firemen employed by the Seaboard against the Seaboard and the Brotherhood of Locomotive Firemen and Enginemen as the representative under the Railway Labor Act of all locomotive firemen employed by the Seaboard (hereinafter called the Seaboard Brotherhood).

2. The class of Negro locomotive firemen employed by the Atlantic Coast Line Railroad Company (hereinafter called the Coast Line) against the Coast Line and the Brotherhood of Locomotive Firemen and Enginemen as the representative under the Railway Labor Act of all locomotive firemen employed by the Coast Line (hereinafter called the Coast Line Brotherhood).

3. The class of Negro locomotive firemen employed by the Southern Railway Company, disregarding but considered as including its subsidiaries (hereinafter called the Southern) against the Southern and the Brotherhood of Locomotive Firemen and Enginemen as the representative under the Railway Labor Act of all locomotive firemen employed by the Southern (hereinafter called the Southern Brotherhood).

If and when such an action is brought in or transferred to an appropriate forum the question of whether such consolidation is proper can be considered. It may or may not be appropriate to try all three actions at one time. Each of the defendants will set up the separate agreements of which there are three (i.e. one between the Seaboard and the Seaboard Brotherhood, another between the Coast Line and the Coast Line Brotherhood, and still another between the Southern and the Southern Brotherhood), and of which, in each case, the provisions of the jointly negotiated agreement of February 18, 1941, constitute but a part.

It may well be that the convenience of the parties and the furtherance of justice will not be served by such a consolidation. In any event, it is respectfully submitted that there is no foundation in fact for the statement in the Memorandum for the United States as *Amicus Curiae* that this case is important "because it represents an effort by

the Negro firemen to enforce the *Steele* and *Tunstall* rulings in a single lawsuit applicable throughout most of the South, instead of through a number of suits brought in different districts against various railroads and different locals of the Brotherhood". If, as a matter of fact, consolidation is desirable, there is no reason or necessity for bringing different suits in different jurisdictions, and no importance whatever need be attached to the fact that this is a "single lawsuit".

The instant suit, for example, could just as well have been brought, by the one complaint, filed in the District Court for the Eastern District of Virginia, at Alexandria. If the plaintiffs and their counsel are assiduous to protect and preserve the rights of the respective classes of Negro locomotive firemen, why have they spent nearly two years in the effort to maintain this action in the District of Columbia when it could have been brought at any time in a convenient forum in which all questions of service, venue, and jurisdiction have been set at rest (*Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 148 F. 2d 403 (C. C. A. 4th, April 9, 1945), and *Brotherhood of Locomotive Firemen and Enginemen* v. *Tunstall*, 163 F. 2d 289 (C. C. A. 4th, August 20, 1947, with certiorari denied by this Court on December 15, 1947)) unless, of course, this Court should affirm the court below in directing that "the case" be transferred to the Northern District of Ohio.

If the Brotherhood, as the defendant in these Negro firemen cases, is, in each case, the unincorporated association in its common name as an entity, and can only be sued in Cleveland, and is not, as the case may be, the Seaboard Brotherhood, or the Coast Line Brotherhood, or the Southern Brotherhood, or the Norfolk Southern Brotherhood (the defendant in the *Tunstall* case), and suable as such wherever

adequately represented, then the *Tunstall* case was erroneously decided and all such pending cases, including the *Hinton* case, must fail. Such is obviously not the situation.

The court below correctly analyzed the *Tunstall* decision in 148 F. 2d 403, but it failed to carry forward and apply that analysis in its ultimate conclusion. It may be that the very fact of the consolidated form of the action caused confusion. In the instant case the Coast Line made the same motion for a stay as was made by the Seaboard, based upon the pendency of the *Rolax* case (referred to in the Memorandum for the United States as *Amicus Curiae*) which was also pending in the Eastern District of Virginia. That motion was denied by the District Court for the reason that in the *Rolax* case a motion to quash the service was still pending (R. 61, 62).

Suppose the Coast Line's motion had been granted. The order upon the Seaboard's motion removed the Seaboard and the Seaboard Brotherhood from the case. The order upon the Coast Line's motion would have removed the Coast Line and the Coast Line Brotherhood from the case, and there would have been left as defendants only the Southern and the Southern Brotherhood. It should be apparent, without more, that the Brotherhood, *qua* Brotherhood, "the unincorporated association in its common name as an entity" was not, in fact, a defendant at all. If it had been, any injunction granted against it as such, enjoining the carrying out of the Agreement of February 18, 1941, would necessarily have been as effective as to the Seaboard as it was with respect to the Coast Line and the Southern. Any such result would, of course, have had the effect of overruling the order of November 17, 1947 (see the Appendix hereto), and the form of the injunction granted by the order of December 3, 1947, negatived any such result (R. 66-72).

Conclusion.

1. The court below was correct in holding, even though it was an academic matter to do so, that the inhabitancy of the Brotherhood, *qua* Brotherhood, was in Cleveland, Ohio and that, under the Federal venue statute (at the time of the hearing before the District Court, Title 28, U. S. C. Sec. 112; at the time of the decision by the court below, Title 28, U. S. C. Sec. 1391 (b)) a suit against the Brotherhood, *qua* Brotherhood, could not be maintained, under that statute, in the District of Columbia.

2. The court below was correct in holding that the Federal venue statute governed to the exclusion of the local venue statute (D. C. Code (1940), Sec. 11-308).

3. If this Court should not concur that the Federal venue statute governed to the exclusion of the local venue statute, the local venue statute, nevertheless, does not authorize the action to be maintained in the District of Columbia, for the following reasons:

a) The presence of a legislative representative or other members of the Brotherhood within the District of Columbia may cause the Brotherhood, *qua* Brotherhood, to be "found" within the District for the purposes of the local venue statute, in some cause of action based upon something other than its functioning as the representative of locomotive firemen, but the Brotherhood, *qua* Brotherhood, and apart from such representation, was not and could not have been (for the reasons above set forth) a defendant to this action.

b) No members, or representatives, of the Seaboard Brotherhood, the Coast Line Brotherhood, or the Southern Brotherhood, are "found" within

the District, within the meaning of the local venue statute.

4. The court below erred in directing the District Court to transfer "the case" to the Northern District of Ohio. To the extent that that was a holding that under the Federal venue statute the Brotherhood could only be sued in Ohio, the court below was also in error. In addition, Section 1406(a), Title 28, U. S. C. only authorizes the transfer of a case to a district or division "in which it could have been brought." There is nothing in the record to show that the case could have been brought in that district. Such a transfer could be ordered only if the record showed that service could be had upon the railroad defendants in that district, or if the railroad defendants were not parties to the case, which they still are.

5. The court below should have directed the District Court to transfer the case to an appropriate district, leaving to the District Court the determination, upon the facts presented and to be presented to that court, as to what would be an appropriate court where the action could have been brought. If, however, upon this record, it is proper for this Court or the court below to give directions in that regard, the District Court should be directed to transfer the case to the Eastern District of Virginia.

Respectfully submitted,

JAMES B. McDONOUGH, JR.,
FRANK J. WIDEMAN,
Counsel for Seaboard Air Line Railroad Company, as *Amicus Curiae*.

Dated October 8, 1949.

APPENDIX.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA.

LEROY GRAHAM, *et al.*,
On behalf of themselves and all others similarly situated,
Plaintiffs,

v.

SOUTHERN RAILWAY COMPANY, *et al.*,
Defendants.

Civil Action
No. 4330-47

ORDER (A) GRANTING STAY OF PROCEEDINGS HEREIN AS TO SEABOARD AIR LINE RAILROAD COMPANY AND BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN AS THE REPRESENTATIVE OF LOCOMOTIVE FIREMEN EMPLOYED BY SEABOARD AIR LINE RAILROAD COMPANY, AND (B) DENYING PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION AS TO SEABOARD AIR LINE RAILROAD COMPANY AND BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN AS THE REPRESENTATIVE OF LOCOMOTIVE FIREMEN EMPLOYED BY SEABOARD AIR LINE RAILROAD COMPANY.

This cause came on to be heard on the 10th day of November, 1947, upon the complaint and

Upon the affidavits of W. R. C. Cocke and James S. Riggan, by them verified October 31, 1947, and upon the motion of defendant, Seaboard Air Line Railroad Company, dated October 31, 1947, for an order (a) dismissing the

complaint (i) as to the plaintiffs: John W. Warran, Robert Murray, William Pratt, Luther Thomas, Ernest Duckett, John Cotton, Spencer Hicks, Moses Maxwell, A. A. Fields, Edward Jackson, C. B. Battle, M. C. Davis, Lonnie Gorham, James Johnson, Walter Thomas, Thomas Edwards, Sr., and George W. Zimmerman, on the ground that as to such plaintiffs the complaint failed to state a claim against defendant, Seaboard Air Line Railroad Company, upon which relief could be granted and (ii) as to the plaintiffs: LeRoy Graham, Joseph Munlin, Ed Sullivan and Sam Hogan, on the ground that there is another class action for the same cause brought on their behalf as locomotive firemen employed by defendant Seaboard Air Line Railroad Company, pending in the District Court of the United States for the Eastern District of Virginia, against defendant, Seaboard Air Line Railroad Company and the Brotherhood of Locomotive Firemen and Enginemen as the representative under the Railway Labor Act of the craft or class of locomotive firemen employed by defendant, Seaboard Air Line Railroad Company, or (b) in the alternative for an order in this cause staying all further proceedings herein against defendant, Seaboard Air Line Railroad Company during the pendency of the class action pending in the District Court of the United States for the Eastern District of Virginia, above mentioned;

Upon the affidavit of Benjamin F. McLaurin verified October 25, 1947, and upon the motion of plaintiffs dated October 27, 1947, for a preliminary injunction against the defendants Southern Railway Company, Atlantic Coast Line Railroad Company, Seaboard Air Line Railroad Company, Brotherhood of Locomotive Firemen and Enginemen, Lodge No. 7 "Potomac"—Brotherhood of Locomotive Firemen and Enginemen, Lodge No. 532 "National Capitol"—Brotherhood of Locomotive Firemen and Enginemen, Marven M. McQuade and William E. Lacey (and as to the corporation defendants and the Brotherhood of Locomotive Firemen and Enginemen and its subordinate lodges above named, their officers, agents, servants, employees and

attorneys) (a) restraining said defendants, and all of them, from recognizing or enforcing or complying with the agreement of February 18, 1941 (Exhibit A to the complaint); (b) ordering and directing the defendant railroads to cause the other railroads and terminal companies mentioned in Paragraphs 13, 14 and 15 of the complaint to cease and desist from recognizing or enforcing the said agreement dated February 18, 1941, and (c) enjoining the defendant Brotherhood of Locomotive Firemen and Enginemen from purporting to act as plaintiffs' representative or as the representative of the class or craft of locomotive firemen so long as it should not represent or act fairly on behalf of all locomotive firemen;

And it appearing to the Court that there is pending in the District Court of the United States for the Eastern District of Virginia a class action (Civil Action No. 674) in which the plaintiff, David H. Hinton, alleges that he is a locomotive fireman employed by defendant, Seaboard Air Line Railroad Company, and that he brings the action in his individual capacity and as a representative of all negro locomotive firemen employed by Seaboard Air Line Railroad Company and in which the defendants are said Seaboard Air Line Railroad Company (a defendant herein), Brotherhood of Locomotive Firemen and Enginemen (a defendant herein), Ocean Lodge No. 76—Brotherhood of Locomotive Firemen and Enginemen, Devotion Lodge No. 402—Brotherhood of Locomotive Firemen and Enginemen, Port Norfolk Lodge No. 775—Brotherhood of Locomotive Firemen and Enginemen, and in which it is alleged that the Brotherhood of Locomotive Firemen and Enginemen, the defendant therein, is the representative under the Railway Labor Act of the craft or class of locomotive firemen employed by the Seaboard Air Line Railroad Company, and that it is sued as such representative, and in which it is alleged that the Southeastern Carriers' Conference Agreement, dated February 18, 1941, upon which the complaint herein is predicated, is unlawful and in which injunctive

relief is prayed; and the Court having heard argument of counsel and being advised in the premises

It is Ordered that this action be, and the same hereby is, stayed as against defendant, Seaboard Air Line Railroad Company and the Brotherhood of Locomotive Firemen and Enginemen as the representative under the Railway Labor Act of the craft or class of firemen employed by defendant, Seaboard Air Line Railroad Company, and that the plaintiffs and their attorneys herein be, and they hereby are, stayed from taking any further action in this cause against said defendant Seaboard Air Line Railroad Company and against the Brotherhood of Locomotive Firemen and Enginemen as the representative under the Railway Labor Act of the craft or class of locomotive firemen employed by defendant Seaboard Air Line Railroad Company, until entry of final judgment in the above mentioned case of *Hinton* v. *Seaboard Air Line Railroad Company, et al.*, No. 674, pending in the District Court of the United States for the Eastern District of Virginia; and

It is Further Ordered that with respect to the defendant Seaboard Air Line Railroad Company and the Brotherhood of Locomotive Firemen and Enginemen as the representative under the Railway Labor Act of the craft or class of locomotive firemen employed by defendant Seaboard Air Line Railroad Company the motion of the plaintiffs for a preliminary injunction be, and the same hereby is, denied.

(sgd.) Alexander Holtzoff
Justice
District Court of the United States
for the District of Columbia.

Dated November 17, 1947.